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Supreme Court, U.S.
FILED
JUN 10 2004
OFFICE OF THE CLERK

No. 03-1428

In the Supreme Court of the United States

CITY OF AUSTIN, ET AL., PETITIONERS

v.

NORMAN MINETA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

THOMAS L. SANSONETTI
Assistant Attorney General

STEPHANIE TAI
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, requires federal agencies to prepare an environmental impact statement even if an extensive environmental analysis reveals that adopted mitigation measures will result in the project not having a significant effect on the environment.

2. Whether the court of appeals applied the appropriate legal standard in upholding the federal agencies' determination that adopted mitigation measures for a pipeline project rendered possible environmental risks insignificant.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 352 F.3d 235. The order of the district court (Pet. App. 20a-66a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 2003. A petition for rehearing was denied on January 12, 2004 (Pet. App. 97a-98a). The petition for a writ of certiorari was filed on April 12, 2004 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners challenge the decision of the Department of Transportation Office of Pipeline Safety and the

Environmental Protection Agency (together, the Lead Agencies) not to prepare an environmental impact statement for the Longhorn pipeline project proposed by the Longhorn Partners Pipeline, L.P. (Longhorn). The district court granted the Lead Agencies' motion for summary judgment and dismissed the case. Pet. App. 20a-66a. The court of appeals affirmed. *Id.* at 1a-19a.

1. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, directs federal agencies to prepare a detailed statement, known as an environmental impact statement (EIS), when undertaking "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). See *Department of Transp.* v. *Public Citizen*, No. 03-358 (June 7, 2004), slip op. 1. NEPA is a procedural statute intended to promote environmentally informed decision-making by federal agencies. See, *e.g.*, *ibid.*; *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87 (1983); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978). NEPA injects environmental considerations into the federal agency's decision-making process and informs the public that the agency has considered environmental concerns in the process. See *Andrus* v. *Sierra Club*, 442 U.S. 347, 350-351 (1979).

NEPA does not mandate "particular results," but instead "simply prescribes the necessary process" to ensure that federal agencies will take a "hard look" at environmental consequences. *Methow Valley*, 490 U.S. at 350; see *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976). NEPA does not require agencies to "elevate environmental concerns over other appropriate considera-

tions." *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980).

The Council on Environmental Quality's (CEQ's) regulations implementing NEPA provide a procedure for determining whether an EIS is necessary for particular federal actions. Those regulations provide for the preparation of "environmental assessments" (EAs), which are usually "concise" documents that "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact [(FONSI)]." 40 C.F.R. 1508.9(a)(1). An EIS is not required if the agency concludes in an EA and FONSI that the proposed action will not have a significant effect on the environment. *Ibid.*; 40 C.F.R. 1508.13.

Under the CEQ regulations, a FONSI must "briefly present[] the reasons why an action * * * will not have a significant effect on the human environment." 40 C.F.R. 1508.13. An agency may conclude, however, that mitigation measures will reduce the project's potential impacts so that they are no longer significant, and the agency may condition its decision not to prepare a full EIS on adoption of mitigation measures. *City of Auburn* v. *United States*, 154 F.3d 1025, 1033 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999); see *Audubon Soc'y* v. *Dailey*, 977 F.2d 428, 435-436 (8th Cir. 1992); *Roanoke River Basin Ass'n* v. *Hudson*, 940 F.2d 58, 62 (4th Cir. 1991), cert. denied, 502 U.S. 1092 (1992); *C.A.R.E. Now, Inc.* v. *FAA*, 844 F.2d 1569, 1575 (11th Cir. 1988); *Cabinet Mountains Wilderness* v. *Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982). In such instances, an agency issues a "mitigated" FONSI explaining that potentially significant effects of a project have been avoided by mitigation measures reducing those effects to a level of insignificance.

2. In 1997, Longhorn purchased from the Exxon Pipeline Company a crude oil pipeline running from Crane, Texas, to Houston, Texas. Pet. App. 5a. Longhorn purchased the pipeline to transport gasoline and other petroleum products from Gulf Coast refineries to El Paso, Texas. To accomplish that goal, Longhorn proposed to extend the pre-existing pipeline to El Paso. *Id.* at 69a. The entire pipeline operation, as envisioned by Longhorn, is a 731-mile system that would eventually transport 225,000 barrels per day of refined petroleum product from Houston to El Paso and Odessa. *Id.* at 22a.

3. Petitioners sued to compel the federal government, which has regulatory responsibilities respecting pipeline safety, to perform a full environmental review of the impacts of the Longhorn pipeline operation. The district court entered a preliminary injunction against the United States and directed the Department of Transportation "and/or" the Environmental Protection Agency (EPA) to comply with NEPA by preparing an EIS.[1] Pet. App. 140a. Petitioners and the Lead

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[1] The Department of Transportation has statutory responsibility for ensuring the safe transportation of hazardous liquids by pipeline. Pursuant to 49 U.S.C. 60101 *et seq.*, the Department of Transportation has promulgated safety standards concerning pipeline construction, operation, and maintenance. See 49 C.F.R. Pts. 40, 190, 195, 199. The Department of Transportation's Office of Pipeline Safety enforces those regulations and inspects pipelines to monitor compliance with its safety standards. Under the Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.*, the Office of Pipeline Safety has responsibility for review and approval of response plans for cleanup in case of a spill. See 33 U.S.C. 1231, 1321; 49 C.F.R. Pt. 194. Although EPA has no direct regulatory responsibilities respecting pipeline safety, it volunteered to take a joint lead role in the negotiated environmental review process in order to lend its

Agencies then negotiated a settlement agreement, entered as a court order on March 1, 1999, under which the Lead Agencies undertook an extensive environmental analysis of the Longhorn project under NEPA. *Id.* at 156a-184a, 185a-188a. The Lead Agencies agreed to consider any reasonable mitigation measures that would prevent the project from significantly affecting the environment, including conditioning the issuance of a FONSI upon the implementation of such measures. *Id.* at 161a (para. 8).

After conducting an extensive review and considering public comments, the two Lead Agencies—the Office of Pipeline Safety and EPA—sought CEQ's advice over whether to issue a FONSI. CEQ, the agency that provides legal and policy direction for implementing NEPA, reviewed an internal draft of the Final EA and the mitigation plan so that CEQ could provide advice on the proper application of NEPA to the Longhorn project. Pet. App. 77a. After noting that the mitigation plan will "reduce the probability of a spill to a minimum and that the threat to the environment is insignificant based on the extensive mitigation measures being implemented," CEQ agreed that a mitigated FONSI was appropriate. *Id.* at 194a. CEQ summed up its analysis by concluding that "virtually nothing could be gained in terms of useful environmental information or analysis by 'redoing' this extensive document as an EIS, other than sheer delay." *Id.* at 196a.

After more than a year-and-a-half of environmental review of the proposed action, including substantial public participation, the Lead Agencies signed a

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experience and expertise to the environmental review of the Longhorn pipeline project.

FONSI based on a detailed EA. The analysis in the EA provided the basis for the conclusion that normal operation of the pipeline would itself have no significant impact on the environment. Rather, any potentially significant impacts associated with the pipeline would relate primarily to the possibility of a leak or spill that could have environmental or public safety consequences. As noted in the FONSI, the "EA in this matter is far more than a generic look" at the environmental impacts of a pipeline. Pet. App. 79a. Rather, the analysis involved a level of "scientific rigor and conservatism" that is "unprecedented in NEPA review" of pipeline projects. *Id.* at 95a.

To address the possibility of such potentially significant impacts and to increase leak detection and response capabilities, the project incorporated 40 mitigation measures ranging from pipe repair or replacement to a state-of-the-art leak detection system in the area where the pipe crosses the environmentally sensitive Edwards Aquifer. Pet. App. 79a-84a. The mitigation plan also required rigorous in-line inspections after startup, to be conducted by an independent third party approved by the Office of Pipeline Safety and as dictated by Longhorn's Operational Reliability Assessment. *Id.* at 80a. Those mitigation measures are legally binding on Longhorn and will be enforced by the Office of Pipeline Safety. *Id.* at 42a.

The Lead Agencies determined that the mitigation measures would lead to a 20-fold reduction in the frequency and probability of spills, thereby reducing the probability of potential impacts from the proposed project to a level of insignificance. Pet. App. 40a. As stated in the FONSI, the risks

> are not only minimal in an absolute sense, but are far lower than risks normally associated with operation of similar pipelines and far lower than similar risks much of the same environment faced over the fifty years [Exxon Pipeline Company] operated the Houston to Crane segment. They add no large incremental risk to the overall risks of pipeline failure along most of the pipeline's route and Longhorn's mitigation measures may even substantially reduce some pre-existing risks.

Id. at 91a-92a.

The Lead Agencies based their determination on analyses of the probability of failure for about 8000 individual pipeline segments, the nature of harm a spill or leak might cause to each area the pipeline traversed, and alternatives for reducing both the probability and consequences of failure. They also performed statistical analyses to estimate pre-mitigation and post-mitigation risk, concluding that only two or three product spills would likely occur over the 50-year life of the mitigated pipeline and that the effects of such spills would not result in significant impacts. Pet. App. 85a. Their evaluation included an assessment of the risk of surface water contamination, *id.* at 85a-86a, drinking water contamination, *id.* at 86a-87a, the contamination of an unusually sensitive aquifer (Barton Springs), *id.* at 87a-88a, death or injury, *id.* at 88a-89a, and overall area risk, *id.* at 89a-90a.[2]

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[2] The petition inaccurately claims that the Lead Agencies concluded there was a 15% to 20% risk of environmental damage from the pipeline. Pet. 7-8, 16, 19. Petitioners have apparently arrived at that figure by improperly aggregating the Lead Agencies' estimates of residual risk to overlapping types of environmental and social amenities.

3. On cross-motions for summary judgment, the district court upheld the agency's NEPA analysis and FONSI. Among other matters, the court recognized that the Lead Agencies' consultation with CEQ did not render the FONSI decision arbitrary and capricious. Pet. App. 39a. Instead, the court held that the Lead Agencies properly took a hard look at the relevant factors before turning to CEQ for guidance. *Ibid.* The court also upheld the Lead Agencies' issuance of a mitigated FONSI, recognizing that a "mitigated FONSI avoids the expense and delay of an EIS, giving the project applicant an incentive to volunteer mitigation measures beyond what agencies could force it to adopt." *Id.* at 40a.

4. The court of appeals affirmed. Pet. App. 1a-19a. The court held that the Lead Agencies had not acted in bad faith in consulting with the CEQ. *Id.* at 12a-13a. The court also rejected petitioners' claim that the Lead Agencies had made an impermissible policy-based decision by determining that the mitigation measures rendered insignificant any risks associated with the Longhorn project, stating that "determining whether significance exists inherently involves some sort of a subjective judgment call." *Id.* at 17a n.5.

ARGUMENT

The court of appeals correctly concluded that NEPA does not require the Lead Agencies to prepare an EIS, above and beyond the extensive environmental analysis that those agencies have already conducted, to evaluate the environmental impacts of the Longhorn pipeline project. The court of appeals' affirmance of the district court's fact-bound decision does not conflict with any decision of this Court or any other court of appeals. Review by this Court is accordingly not warranted.

1. The lower court correctly held that the Lead Agencies fulfilled the requirements of NEPA by determining, after an extensive environmental analysis, that an EIS was unnecessary for the Longhorn pipeline project. As the D.C. Circuit stated in *Cabinet Mountains*:

> [A]n EIS must be prepared only when significant environmental impacts will occur as a result of the proposed action. If, however, the proposal is modified prior to implementation by adding specific mitigation measures which completely compensate for any possible adverse environmental impacts stemming from the original proposal, the statutory threshold of significant environmental effects is not crossed and an EIS is not required.

685 F.2d at 682 (internal quotation marks and citations omitted). The Lead Agencies properly concluded that the enforceable mitigation measures prescribed in this case would avoid any significant impacts that could create the need for an EIS. See 42 U.S.C. 4332(2)(C).

Every court of appeals that has addressed the issue has held that the adoption of mitigation measures may eliminate the need for an EIS. *Greenpeace Action* v. *Franklin*, 14 F.3d 1324, 1335 (9th Cir. 1992) (stating that mitigation may obviate the need for an EIS even where the effectiveness of mitigation is uncertain); *Audubon Soc'y* v. *Dailey*, 977 F.2d 428, 435-436 (8th Cir. 1992) ("An agency may certainly base its decision of 'no significant impact' on mitigating measures to be undertaken by a third party."); *Roanoke River Basin Ass'n* v. *Hudson*, 940 F.2d 58, 62 (4th Cir. 1991) ("If a mitigation condition eliminates all significant environmental effects, no EIS is required."), cert. denied, 502 U.S. 1092 (1992); *C.A.R.E. Now, Inc.* v. *FAA*, 844 F.2d

1569, 1574 (11th Cir. 1988) (stating that "[w]hen mitigation measures compensate for otherwise adverse environmental impacts, the threshold level of significant impacts is not reached so no EIS is required"); *Cabinet Mountains*, 685 F.2d at 683 (explaining that courts should uphold an agency's determination that the mitigated project does not require an EIS unless that determination is arbitrary or capricious).

Petitioners are mistaken in asserting (Pet. 12-17) that an agency may not bring its scientific expertise to bear in evaluating risk as part of the determination of significance in an EA and, consequently, in determining whether mitigation measures will reduce that risk below a level of significance. As the Second Circuit recognized in *City of New York*, agencies have "latitude in determining whether the risk is sufficient to require preparation of an EIS." *City of New York* v. *United States Dep't of Transp.*, 715 F.2d 732, 746 n.14 (1983), cert. denied, 465 U.S. 1055 (1984). That latitude is necessary because risk assessment is a key consideration in determining the significance of possible environmental impacts, and the "concept of overall risk incorporates the significance of possible adverse consequences discounted by the improbability of their occurrence." *Id.* at 738. The court of appeals in this case correctly deferred to the Lead Agencies' determination that the Longhorn project presents little risk of accident that could significantly affect the environment. That determination is within the agencies' expertise. Pet. App. 17a-18a n.5; see *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 376-377 (1989).[3]

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[3] Contrary to petitioners' suggestions (Pet. 14-15, 19), CEQ properly participated in this case. The Lead Agencies properly sought CEQ's advice on NEPA compliance because CEQ, among

2. Petitioners are mistaken in contending (Pet. 18-20) that the court of appeals' decision conflicts with *National Audubon Society* v. *Hoffman*, 132 F.3d 7 (2d Cir. 1997). In that case, the Second Circuit stated that an EIS should be prepared "[w]hen the determination that a significant impact will or not result from the proposed action is a close call." *Id.* at 13. Nevertheless, the court ultimately assessed the agency's compliance with NEPA under the same "arbitrary and capricious" standard that the court of appeals applied in this case. Compare *id.* at 18, with Pet. App. 17a & n.4. See *Department of Transp.* v. *Public Citizen*, No. 03-358 (June 7, 2004), slip op. 9. The Second Circuit's decision in *National Audubon Society* and the court of appeals' decision here are therefore fully consistent in applying that standard.[4]

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other duties, is responsible for interpreting NEPA, issuing regulations, providing interagency coordination, and resolving interagency conflicts involving NEPA. See *Department of Transp.* v. *Public Citizen*, No. 03-358 (June 7, 2004), slip op. 2-3; 42 U.S.C. 4344; Exec. Order No. 11,514, 3 C.F.R. 531 (1970 comp.), as amended by Exec. Order No. 11,991, 3 C.F.R. 123 (1978 comp.); cf. *Pacific Legal Found.* v. *Council on Envtl. Quality*, 636 F.2d 1259, 1261 (D.C. Cir. 1980) (describing CEQ's role in interagency coordination).

[4] Indeed, to the extent that the court of appeals itself suggested any tension between its decision and the Second Circuit's decision in *National Audubon Society*, that suggestion is dictum. The court of appeals questioned the Second Circuit's statement that an EIS would be required if the significance of a project's impact is a "close call," Pet. App. 17a n.4, but the court of appeals never determined that the assessment of the Longhorn pipeline itself presented such a "close call." Therefore, even if the court of appeals had squarely rejected the Second Circuit's statement, that rejection would be a nonbinding observation that would provide no basis for this Court's review.

Although the Second Circuit in *National Audubon Society* ruled against the government, the difference between the ultimate outcomes of that case and this one turns on their facts and does not present any issue warranting this Court's review. In *National Audubon Society*, the Second Circuit concluded that the Forest Service had acted arbitrarily and capriciously in deciding not to prepare an EIS for a logging operation. The court of appeals based that holding on its review of the Forest Service's analysis of the applied mitigation measures. 132 F.3d at 16-17. The Second Circuit pointed out that the Forest Service itself had acknowledged that there was a problem with unauthorized use by all-terrain vehicles and that their use would likely increase with the project. *Id.* at 16. Although the Forest Service proposed mitigation measures to counter the impact of the unauthorized traffic, the Service "conducted no study of [the mitigation measure's] likely effects" and "proposed no monitoring to determine how effective the proposed mitigation would be." *Id.* at 17.

In contrast, the mitigation measures in this case are both far better understood and far more effective than those at issue in *National Audubon Society*. The Lead Agencies studied the Longhorn mitigation measures extensively through the use of an enhanced version of the relative risk model commonly used in the pipeline industry. Pet. App. 71a-72a. The adopted mitigation measures include an operation reliability assessment that Longhorn will perform at least yearly to provide a technical assessment of the effectiveness of the mitigation measures. *Id.* at 82a. The difference in the outcome in *National Audubon Society* and this case accordingly reflects differences in the character of the

projects and the selected mitigation measures, which present no matter warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

THOMAS L. SANSONETTI
Assistant Attorney General

STEPHANIE TAI
Attorney

JUNE 2004